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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MICHIGAN FINANCIAL INVESTMENTS, L.L.C.,

Petitioner,

v.

DETROIT BUILDING AUTHORITY, and
CITY OF DETROIT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. ALLEN BASS
Counsel of Record
LEWIS & MUNDAY, P.C.
2490 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
(313) 961-2550

Attorney for Respondent
The Detroit Building Authority

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 TO REVIEW PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS VIOLATION CLAIM WHERE PETITIONER FAILED TO PROPERLY PRESENT THIS CLAIM TO THE STATE COURTS AND THE STATE COURTS FAILED TO DECIDE THIS ISSUE?

2. WHETHER PETITIONER LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER AND NOT ITS OWN FOURTEENTH AMENDMENT RIGHTS?

3. WHETHER PETITIONER HAS ESTABLISHED ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WHERE THE MICHIGAN SUPREME COURT RELIED ON AN APRIL 2002 RULE PROMULGATED BY THE MICHIGAN STATE TAX COMMISSION PROHIBITING THE FORECLOSURE OF PROPERTY OWNED BY A GOVERNMENTAL ENTITY TO PRECLUDE PETITIONER FROM OBTAINING THE PROPERTY IN A PUBLIC AUCTION FIVE MONTHS LATER OR WHETHER PETITIONER HAS WAIVED THIS CLAIM BY FAILING TO ADEQUATELY BRIEF AND CITE LEGAL AUTHORITY IN SUPPORT OF THIS CLAIM?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Detroit Building Authority is a municipal corporation which has no parent company and no corporate stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Counter-Statement of Jurisdiction	1
Constitutional Provision, Statute and Regulation Involved	2
Counter-Statement of the Case	5
Reasons for Denying the Writ	12
I. The Federal Question Posed And Briefed By Petitioner Was Not Properly Presented And Preserved In The State Courts	13
II. Petitioner Lacks Standing Where It Seeks To Assert The Alleged Fourteenth Amendment Rights Of The Wayne County Treasurer	16
III. Petitioner Has Not Established Any Violation Of Its Own Fourteenth Amendment Rights And Has Waived Any Such Claim By Failing To Show How Petitioner's Due Process Rights Were Violated	17
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997).....13, 14, 15

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).....15

Broderick v. Oklahoma, 413 U.S. 601 (1973) 16

Cardinale v. Louisiana, 394 U.S. 437 (1969).....2

Exxon Corp v. Eagerton, 426 U.S. 176 (1983).....2, 15

Fuller v. Oregon, 417 U.S. 40 (1974).....2, 15

Gibbes v. Zimmerman, 290 U.S. 326 (1933) 2

Hanson v. Denckla, 357 U.S. 235 (1958).....15

Howell v. Mississippi, 543 U.S. 440 (2005).....2, 14

In Re Certified Questions, 331 N.W.2d 456 (1982).....11

Los Angeles Police Dep't v. United Reporting Publishing Corp., 528 U.S. 32 (1999).....16

McGowan v. Maryland, 366 U.S. 420 (1961).....16

Moore v. Lafayette Life Ins. Co., 458 F.3d 416 (6th Cir. 2006) 18

New York v. Ferber, 458 U.S. 747 (1982) 16

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).....15

Street v. New York, 394 U.S. 576 (1969) 15

U.S. v. Raines, 362 U.S. 17 (1960).....16

Webb v. Webb, 451 U.S. 493 (1981).....2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Mich. Comp. Laws § 123.954 5
Mich. Comp. Laws § 123.958 5
Mich. Comp. Laws § 123.963 5
Mich. Comp. Laws § 211.78b.....6
Mich. Comp. Laws § 211.78(f).....6
Mich. Comp. Laws § 211.78g.....7
Mich. Comp. Laws § 211.78g(1) 3, 8, 9
Mich. Comp. Laws § 211.78i(6)(c) and (d).....6
Mich. Comp. Laws § 211.371.....9
Mich. Comp. Laws § 211.372.....9
Mich. Comp. Laws § 211.782.....6
1948 Mich. Pub. Acts 31 5
1999 Mich. Pub. Acts 123 6
2001 Mich. Pub. Acts 94 7
28 U.S.C. § 1257(a).....1, 13

COURT RULES

Supreme Court Rule 10.....12
Supreme Court Rule 29.6..... ii

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. 1, § 10, cl. 1 ..... 10, 11, 14

U.S. Const. amend. V 11

U.S. Const. amend. XIV ..... *passim*

OTHER AUTHORITY

State Tax Commission Bulletin ..... *passim*

OPINIONS BELOW

The list of lower court citations set forth at page 1 of the Petition is correct.

COUNTER-STATEMENT OF JURISDICTION

Petitioner's recitation of the procedural history of the case is correct. However, Respondent Detroit Building Authority submits that this Court does not have federal question jurisdiction under 28 U.S.C. § 1257(a) because the purported federal question posed in the Petition for Writ of Certiorari was not decided by the state courts. Petitioner failed to raise the one federal claim that it now presents to this Court prior to the Michigan Supreme Court's summary order of September 28, 2007.

Petitioner's state court pleadings and other filings prior to its motion for rehearing in the Michigan Supreme Court asserted no express violation of its own rights protected by the Fourteenth Amendment to the United States Constitution, and no express violation of the due process rights of the Wayne County Treasurer. They contained no reference to the Fourteenth Amendment to the United States Constitution, or even to the due process clause of the 1963 Michigan Constitution. The Michigan Supreme Court's order summarily disposing of this case neither mentioned nor discussed the Fourteenth Amendment to the United States Constitution, or the term "due process of law."

Although Petitioner's motion for rehearing in the Michigan Supreme Court made a cursory reference to due process rights under the Fourteenth Amendment, it quoted the contract clause and failed to cite any cases construing the Fourteenth Amendment. The Michigan Supreme Court's one-sentence order denying Petitioner's motion for reconsideration did not mention or decide the federal question now posed by Petitioner. Accordingly, federal question jurisdiction is lacking. *Exxon Corp v. Eagerton*, 426 U.S. 176, 181, n. 3 (1983); *Fuller v. Oregon*, 417 U.S. 40, n. 11 (1974); *Webb v. Webb*, 451 U.S. 493, 497-500 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Gibbes v. Zimmerman*, 290 U.S. 326, 328 (1933).

Even if this presentation requirement were deemed to be prudential rather than jurisdictional, the Petition should be denied based on Petitioner's failure to satisfy its burden of showing that the federal issue posed was properly presented in the state court. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourteenth Amendment
to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws. § 211.78g(1)

Except as otherwise provided in this subsection, on March 1 in each tax year, certified abandoned property and property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or more is forfeited to the county treasure for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. If property is forfeited to a county treasurer under this subsection, the foreclosing governmental unit does not have a right to possession of the property until the April 1 immediately succeeding the entry of a judgment foreclosing the property under section 78k or in a contested case until 22 days after the entry of a judgment foreclosing the property under section 78k. If property is forfeited to a county treasurer under this subsection, the county treasurer shall add a $175.00 fee to each parcel of property for which those delinquent taxes, interest, penalties, and fees remain unpaid. A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for

withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

Michigan State Tax Commission
Bulletin Dated April 17, 2002

Reasons to Withhold a Parcel of Property From Forfeiture and Procedures for Withholding a Property From Forfeiture.

The State Tax Commission, at its meeting on April 17, 2002, determined that the following are the reasons that a parcel of property shall be withheld from forfeiture:

* * *

2) A property owned by the U.S. Government, the State of Michigan, a county, a city, a village or a township shall be withheld from forfeiture.

Procedure: If the property is forfeited in error, the County Treasurer removes all of the fees attached to the parcel, files a certificate of cancellation of forfeiture (form 3839) with the Register of Deeds. Notifies the State Treasurer and the Contractor of the error. The State Treasurer will withhold the parcel from foreclosure and stop all title work on the parcel.

COUNTER-STATEMENT OF THE CASE

On May 29, 1997, the Detroit Building Authority purchased two parcels of property for three million dollars and recorded the warranty deed with the Wayne County Register of Deeds on June 25, 1997. As required by the Michigan Building Authority Act, 1948 Mich. Pub. Acts 31 as amended, Mich. Comp. Laws § 123.954, the Detroit Building Authority leased the facilities to the City of Detroit and must convey title to the property to the City at the end of the lease term or the conclusion of its financing, making the City the residual and beneficial owner of the leased properties that enjoys a vested future interest in same. See Mich. Comp. Laws § 123.958; Mich. Comp. Laws § 123.963.

The Detroit Building Authority requested the City Assessor to make the City of Detroit Municipal Parking Department the taxpayer of record on the City tax assessment roll, and to combine the two adjoining tax parcels into a single tax parcel with a known street address of 450 West Congress. By December 2, 1997, the City Assessment roll had been adjusted to reflect that the taxpayer of record for both parcels was the City of Detroit Parking Department. By February 1998, the two parcels had been combined into one parcel for tax purposes.

The Detroit Building Authority financed and constructed a ten-story parking garage on the property at a cost approaching ten million dollars. The

City of Detroit Municipal Parking Department has operated the garage since its opening.

It was subsequently learned that the prior owner had not paid Wayne County property taxes on one of the lots for the 1997 tax year. The Detroit Building Authority was responsible for a prorated share of the 1997 property taxes based on the acquisition date.

In 1999 Mich. Pub. Acts 123, the Michigan Legislature enacted broad changes to its property tax collection system. For the first time, Wayne County was permitted to assume the role of delinquent property tax collector formerly played by the State Department of Treasury and Natural Resources. In 2000, the Wayne County Treasurer assumed the role of delinquent property tax collector for the first time.

Mich. Comp. Laws § 211.78i(6)(c) and (d) required the County Treasurer to review the tax records in the City Assessor's or City Treasurer's office to ascertain persons with an interest in tax delinquent property. As the trial court below found, it was undisputed that the County Treasurer did not review the records of the City Assessor or City Treasurer in ascertaining the identity of persons with an interest in the property.

On April 16, 2001, the Wayne County Treasurer recorded a certificate of forfeiture of one parcel for the unpaid 1997 property taxes. The Treasurer did not provide the City of Detroit with pre-forfeiture notices as required by Mich. Comp. Laws. § 211.78b, § 211.782, and § 211.78f. The Treasurer filed suit to

foreclose the property on June 14, 2001, but did not serve the City with process or other required notices.

On July 27, 2001, the Michigan Legislature enacted 2001 Mich. Pub. Act 94, Mich. Comp. Laws § 211.78g, which provided as follows:

> A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of land from forfeiture under this subsection shall be determined by the state tax commission.

On March 4, 2002, the Wayne County Circuit Court entered a judgment of foreclosure on the property.

On April 17, 2002, the State Tax Commission issued a bulletin identifying properties that were to be withheld from forfeiture by county treasurers. The bulletin provided that property owned by the U.S. Government, the State of Michigan, a county, a city, a village, or a township shall be withheld from forfeiture.

The Wayne County Treasurer scheduled the property to be sold at its annual tax sale on September 26, 2002, five months after issuance of the tax bulletin. The Treasurer published "Rules and Regulations for the Sale of Tax Foreclosed Properties." Rule 4 expressly provided that "the Wayne County Treasurer reserves the right to reject any and all bids." Petitioner bid $370,000.00 and was the successful bidder.

Three days after the auction, the Detroit Building Authority filed suit to enjoin the transfer of the garage property to Petitioner and set aside the tax foreclosure judgment. The City of Detroit joined the action as a plaintiff and Petitioner intervened.

After being sued by the Detroit Building Authority and the City, the Wayne County Treasurer cancelled the sale of the property and allowed the City of Detroit to redeem the property effective November 14, 2002. The Treasurer indicated that the "property had been sold in error." The County issued a check to Petitioner Michigan Financial Investments, L.L.C. (MFI) in the amount of $370,000.00. In May 2003, the Wayne County Treasurer recorded a certificate of redemption discharging the certificate of forfeiture that had been recorded on April 16, 2001.

On June 17, 2003, the City moved for leave to file a cross-claim against the County Treasurer and a counterclaim against Petitioner for declaratory and injunctive relief. The City claimed that it had not received the proper notice of the foreclosure proceedings as required by the Michigan statutes and the United States Constitution. The City moved for summary disposition on June 25, 2003, arguing that the County Treasurer was precluded by Mich. Comp. Laws § 211.78g(1) and the State Tax Commission Bulletin from forfeiting, foreclosing and auctioning the property. It also argued that it had been deprived of its vested property interest in the garage property without notice and a hearing, in violation of its procedural due process guarantees of the Fourteenth Amendment and the Michigan Constitution. Petitioner

MFI responded to the City's motion on July 25, 2003. While Petitioner argued that the Bulletin should not be applied retroactively, its arguments were based on state law regarding construction of statutes. Petitioner did not raise any argument that a retroactive application would violate its rights, or the County Treasurer's rights, under the due process clause of the Fourteenth Amendment to the United States Constitution or the due process clause of the Michigan Constitution.

In an opinion dated December 1, 2003, the trial court ruled that the County Treasurer had deprived the City of identifiable, substantial property interests without the requisite procedural due process.

MFI timely appealed the opinion and order to the Michigan Court of Appeals. Significantly, the Wayne County Treasurer did not appeal the trial court's judgment setting aside the foreclosure judgment in favor of the County Treasurer. The City argued in its Brief for Appellee, pages viii, 18-22, filed on July 1, 2004, that the trial court's judgment in favor of the City could be affirmed on the alternative ground that the State Tax Commission Bulletin, Mich. Comp. Laws § 211.78g(1), Mich. Comp. Laws § 211.371, and Mich. Comp. Laws § 211.372, barred the County Treasurer from forfeiting, foreclosing, and auctioning the public garage property. The Appellee City maintained at pages 21-22 that the County Treasurer knew or reasonably should have known from the recorded deed to the Detroit Building Authority and from the City's assessments records that the property was publicly owned.

On July 5, 2005, the Michigan Court of Appeals issued an unpublished opinion reversing the decision of the trial court and remanding for further proceedings. In a 2-1 vote, the Court ruled that the circuit court erred in holding that the County Treasurer had deprived the City of a vested property interest in violation of procedural due process guarantees.

On October 24, 2005, the Detroit Building Authority and the City filed an application for leave to appeal to the Michigan Supreme Court. In their applications, the City and the Detroit Building Authority asserted that the March 2002 judgment of foreclosure should be set aside because the notice provided to the City was inadequate. Alternatively, both argued that they were entitled to relief because the Wayne County Treasurer was precluded from forfeiting, foreclosing upon and auctioning publicly owned property under state statute and the Tax Commission Bulletin. The Wayne County Treasurer did not oppose those applications.

Petitioner MFI responded to the City's and the Detroit Building Authority's applications, but failed to include any argument that either its own rights under the Fourteenth Amendment to the United States Constitution or the County Treasurer's rights under the Fourteenth Amendment, would be violated by a retroactive application of the State Tax Commission Bulletin. Petitioner cursorily argued at pages 40-42 of its response that its rights under the federal contract clause, U.S. Const. art. 1, § 10, cl. 1, had been violated.

Petitioner also filed its own application for leave to appeal, but raised no federal claims.

On September 28, 2007, the Michigan Supreme Court disposed of all three applications by issuing an order reversing the Court of Appeals and reinstating the order of the Wayne County Circuit Court setting aside the foreclosure sale. The Court's order stated that the foreclosure sale of publicly owned property is prohibited and that the Wayne County Treasurer had reason to know that the property was publicly owned.

Petitioner filed a motion for reconsideration on October 16, 2007. It claimed at pages 8-11 of its motion that the Michigan Supreme Court retroactively applied the Tax Bulletin in a manner violative of Michigan law as set forth in *In Re Certified Questions*, 331 N.W.2d 456 (1982). It maintained that the Wayne County Treasurer had been improperly divested of its property interest in the land. On page 15 of its motion, MFI cursorily claimed that the Supreme Court's order violated its own rights under the contract clause of the federal constitution, U.S. Const. art. 1, § 10, cl. 1. At page 16 of its motion, MFI cursorily contended for the first time that the Supreme Court violated its own due process rights guaranteed by the Fifth and Fourteenth Amendments. It cited no federal case law.

In its response to MFI's motion for reconsideration, the Detroit Building Authority maintained that MFI lacked standing to assert any legal interest or rights of the County Treasurer. (Detroit Building

Authority's Response to Motion for Reconsideration, pages 3-5.) It also argued on pages 4-5 that the Supreme Court had not retrospectively applied the Bulletin to the auction sale of September 26, 2002 because the Bulletin had been issued six months prior to the sale. Additionally, it contended in the alternative that the Bulletin related to procedures and remedies and could properly be applied in a retroactive manner under established state law.

REASONS FOR DENYING THE WRIT

Summary

The Petitioner has not satisfied any of the criteria for a grant of certiorari set forth in Sup. Ct. R. 10. The Petitioner has not established that the Michigan Supreme Court's order even decided a federal question of law, much less an important federal question in a way that conflicts with decisions of a United States Court of Appeals, or this Court.

Petitioner did not properly present or preserve the federal question now posed by timely citing or relying upon the Fourteenth Amendment to the federal constitution in the state courts. The Michigan Supreme Court's order did not mention or decide any Fourteenth Amendment rights of the Petitioner. In fact, a careful reading of the Petition establishes that Petitioner is attempting to assert not its own Fourteenth Amendment rights before this Court, but the Fourteenth Amendment rights of the Wayne County

Treasurer. Petitioner lacks standing to make such an argument. Petitioner does not have its own Fourteenth Amendment due process violation claim because the Tax Commission Bulletin was promulgated in April 2002, five months *before* Petitioner bid on the property in September 2002.

I. THE FEDERAL QUESTION POSED AND BRIEFED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS

Petitioner failed to carry its burden of showing that the federal question raised in its Petition for Certiorari was properly presented to or addressed by the Michigan Supreme Court. Accordingly, this Court should not grant the Petition for Certiorari.

With rare exceptions, in reviewing state court judgments under 28 U.S.C. § 1257(a), this Court will not consider a petitioner's federal claim "[u]nless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). The Michigan Supreme Court did not address Petitioner's federal claim. Neither the order summarily disposing of the case nor the one-sentence order denying Petitioner's motion for rehearing referenced, mentioned or discussed the Fourteenth Amendment or any due process rights.

Nor was Petitioner's federal claim properly presented to the state court. To properly present a

federal claim, petitioner must have clearly cited in his state court petition the federal source of law on which he relies, or a case deciding such a claim on federal grounds. *Howell v. Mississippi*, 543 U.S. 440, 443-445 (2005). "Passing invocations of 'due process' that 'fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment' do not 'meet our minimal requirement that it must be clear that a federal claim was presented.'" *Howell*, 543 U.S. 444, n. 2, citing *Adams v. Robertson*, 520 U.S. 83, 89, n. 3 (1997).

Petitioner failed to cite the Fourteenth Amendment as a basis for a federal claim in the lower state courts or in the Michigan Supreme Court prior to the Supreme Court's September 28, 2007 order. Neither Petitioner's Brief in Opposition to the Detroit Building Authority's Application for Leave to Appeal nor Petitioner's Brief in Opposition to the City's Application for Leave to Appeal cited to the Fourteenth Amendment or to federal due process rights.

Petitioner states at page 11 of its Petition that it preserved a Fourteenth Amendment claim in its motion for reconsideration filed in the Michigan Supreme Court. Petitioner's October 17, 2007 motion contained a short one-paragraph argument at pages 15-16 that the Supreme Court's order violated its own rights under the Contract Clause of the federal constitution, U.S. Const. art. 1, § 10, cl. 1 (providing that no state shall pass any law impairing the obligation of contracts.) Petitioner also made a cursory one-sentence reference to its due process rights under the Fourteenth Amendment on page 11 and

another one-sentence reference on page 16. Such a cursory reference to a purported federal claim in a motion for rehearing does not constitute a proper presentation of the claim sufficient to invoke this Court's jurisdiction.

This Court will generally refuse "to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. 89, n. 3, citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987); *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958); and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). In *Board of Directors of Rotary Int'l*, 481 U.S. 537, this Court refused to consider a federal claim that was first squarely raised in the state appellate court in a petition for rehearing where the state court denied the petition without opinion. The Court held that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary," citing *Exxon Corp v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11 (1974)) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

The Michigan Supreme Court's March 24, 2008 order denying Petitioner's motion for reconsideration was silent on the federal question now posed by Petitioner. Absent a showing to the contrary by Petitioner, and there has been none, it is assumed that Petitioner did not make a proper presentation of

the federal claim in state court. Consequently, this Court should deny the Petition and refuse to consider the federal question raised for the first time, obliquely, in a motion for reconsideration at the state's highest court.

II. PETITIONER LACKS STANDING WHERE IT SEEKS TO ASSERT THE ALLEGED FOURTEENTH AMENDMENT RIGHTS OF THE WAYNE COUNTY TREASURER

Petitioner asserts at pages 13-14 of its Petition that the alleged retroactive application of the State Tax Commission Bulletin by the Michigan Supreme Court deprived the Wayne County Treasurer of his vested right in the foreclosure judgment without the procedural due process guarantees of the federal constitution. Petitioner may not seek review on this ground because it lacks standing to assert the alleged Fourteenth Amendment Rights of another.

Constitutional rights are personal in nature. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). A litigant may only assert his own constitutional rights or immunities; he has no standing to assert the constitutional rights of others. *Broderick v. Oklahoma*, 413 U.S. 601, 610 (1973); *McGowan v. Maryland*, 366 U.S. 429; *U.S. v. Raines*, 362 U.S. 17, 22 (1960).

Under this general principle of constitutional standing, the constitutional rights of the Wayne County Treasurer are personal to the Office of the County Treasurer. Petitioner lacks standing to assert those personal constitutional rights. Accordingly, the Petition should be denied.

III. PETITIONER HAS NOT ESTABLISHED ANY VIOLATION OF ITS OWN FOURTEENTH AMENDMENT RIGHTS AND HAS WAIVED ANY SUCH CLAIM BY FAILING TO SHOW HOW PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED

The Petition should also be denied where Petitioner has not properly presented any claim that it has been deprived of its own property rights without due process of law. Though Petitioner did argue in the Michigan Supreme Court that a retroactive application of the Tax Bulletin would impair its contract rights under the auction sale agreement, Petitioner has never presented or established any claim for a violation of its own Fourteenth Amendment rights.

The Tax Commission Bulletin was promulgated on April 17, 2002. Petitioner did not bid on the property until September 26, 2002, or more than five months *after* the Tax Commission Bulletin had been promulgated. Because Petitioner did not have any right to the property before the Tax Commission Bulletin had been promulgated, Petitioner cannot establish that the Michigan Supreme Court's reliance on the Tax Commission Bulletin deprived Petitioner

of its due process rights under the Fourteenth Amendment.

Moreover, although Petitioner's Question Presented asks whether the Michigan Supreme Court denied *Petitioner's* constitutional due process rights, Petitioner has argued that the *Wayne County Treasurer's* due process rights were violated. This is aptly seen at pages 11-12 of the Petition, where Petitioner writes that "[i]f the Michigan Supreme Court's decision in this case stands, this interest which the Wayne County Treasurer acquired as of March 26, 2002, has been undone by a State Tax Commission rule fundamentally changing existing law." Petitioner's failure to brief or otherwise develop any legal authority in support of its perfunctory statement that "its" own federal due process rights had been violated constitutes a waiver and abandonment of this argument. See generally *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 448 (6th Cir. 2006). Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

G. ALLEN BASS
Counsel of Record
LEWIS & MUNDAY, P.C.
2490 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
(313) 961-2550

Attorney for Respondent
The Detroit Building Authority

Dated: July 24, 2008